No. 80-509

In the

United States Supreme Court

October Term, 1980

AMERICO MONGIELLO,

Petitioner,

-against-

The People of the State of New York,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT.

Reply Brief In Support of Petition For a Writ of Certiorari

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PRELIMINARY STATEMENT

This reply brief is tendered in answer to the Brief heretofore submitted by the respondent which contended:

(1) That even if there were an evidentiary violation it would not under *Spencer v. Texas,* 385 U.S. 554 (1967) rise to constitutional dimension within the purview of the due process clause of the Fourteenth Amendment to the Constitution, and;

(2) That *even if* there was a violation of the equal protection clause of the said Amendment, it could not be considered in this Court since it had not been presented to the New York State Courts.

It is submitted that neither contention is dispositive of the issues presented in this Petition for a Writ of Certiorari.

I.

The Due Process Aspect

Spencer v. Texas, 385 U.S. 554 (1967) relied to a marked degree upon *Delli Paoli v. United States,* 352 U.S. 232 (1957), which was overruled in *Bruton v. United States,* 391 U.S. 123 (1968), and which should, in light thereof, be reevaluated insofar as it applies to *Michelson v. United States,* 335 U.S. 469 (1948).

The petitioner was a New York City police officer. He was convicted of perjury, official misconduct and harassment, predicated upon the use of more than "necessary force" in effecting multiple arrests. The testamentary evidence was diametric as to what actually occurred after the petitioner was shot. The case, thus, centered upon whether, indeed, there had been lawlessness by those sworn to uphold the law. Within that aegis, for a prosecutor to inquire of a defense character witness, i.e., Sergeant John Hooper, who was the petitioner's superior officer, whether he had heard that the petitioner while on duty had wrongfully and without justification "punched a man in the face" and then had handcuffed him knowing full well that the petitioner had been exonerated, and asking it bereft of good faith, is egregious. It is matched only by the intrepedity of the respondent in now contending that it would not have influenced the verdict of the jury. (Respondent's Brief in Opposition, p. 7.)

The petitioner was deprived of due process by having such a query put to a witness by a prosecutor acting not only in the absence of good faith but also well knowing

that it was not true. As such, the petitioner was as much deprived of due process as he would have been by the knowing use of false testimony.

II.

The Equal Protection Claim

The petitioner did present this claim on appeal to the Appellate Division of the Supreme Court of the State of New York.

He set forth as the 5th question presented to said Court, "The sentence imposed was excessive." (Petitioner's Brief to the Appellate Division, p. 2.) Additionally, he made reference to *People v. Tyler,* 46 N.Y.2d 251 (1978).

There the Court of Appeals of the State of New York unanimously affirmed the reversal by the Appellate Division of its unanimous reversal and dismissal of an indictment of a Justice of the Supreme Court of the State of New York, who had been convicted after a jury trial of three counts of perjury in the first degree and been sentenced to probation.

This may have been an emotional and ill advised attack upon a judge, but it certainly made clear that the petitioner felt that as a police officer he was not receiving the same treatment as that afforded to a judge. He certainly contended that he was truly being deprived of equal protection of the law.

This was a strident outcry of one who felt that he was being wronged. This was not restrained silence. The point was made and considered by the State Courts.

Conclusion

The respondent contends that "underlying petitioner's conviction were acts of brutality, cover-up of police misconduct, and an attempt to frame an innocent person for a serious offense." (Brief in Opposition to Petition for Writ of Certiorari, p. 9.)

If this were so, it would be exceeded in opprobrium only by the petitioner being adjudged guilty upon evidence violative of due process and sentenced as one who was being punished not for his own putative misdeeds, but for those of other police officers not then before the Court. Such is not justice.

A Writ of Certiorari should thus be granted so as to review and decide the claimed deprivations of the petitioner's rights under the Fourteenth Amendment to the United States Constitution.

Respectfully submitted,

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